STATE OF WISCONSIN
IN SUPREME COURT

No. 03-0442-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES CHVALA,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV, AFFIRMING A PRETRIAL ORDER DENYING CHVALA'S MOTION TO DISMISS THE CRIMINAL COMPLAINT, ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE DANIEL R. MOESER, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is warranted. The state does not oppose Chvala's request for oral argument.

INTRODUCTION

Chvala is charged under Wis. Stat. § 946.12(3) for misusing his official position to divert public resources to

private election campaigns. Chvala challenges these charges on the grounds that Wis. Stat. § 946.12(3) is unconstitutionally vague as applied to him and that this prosecution violates the Speech or Debate Clause and the separation of powers doctrine.[1]

Chvala's claims should be rejected and the court of appeals' decision should be affirmed.

ARGUMENT

I. CHVALA LACKS STANDING TO CHALLENGE WIS. STAT. § 946.12(3) ON GROUNDS OF VAGUENESS.

Chvala argues that § 946.12(3) is unconstitutionally vague as applied to him. He is without standing to do so. In *State v. Tronca*, 84 Wis.2d 68, 267 N.W.2d 216 (1978), this court held that defendants who were actually aware of the criminality of their actions, as Chvala was here, did not have standing to challenge the official misconduct statute on grounds of vagueness. In reaching its conclusion, the court looked at defendants' attempts to cover up their unlawful behavior and evidence that they knew what they were doing was illegal, finding the evidence demonstrated that "[e]ach of the defendants was well aware that he was approaching the area proscribed by the statute." *Tronca,* 84 Wis.2d at 87.

Tronca is squarely on point. The criminal complaint provides clear factual allegations that Chvala knew that the conduct with which he is charged is unlawful. The complaint alleges that Chvala told Andy Gussert, a former director of the Senate Democratic

[1]The state addresses Chvala's arguments in a different order than he has presented them, addressing first his vagueness claim and then addressing his speech or debate clause and separation of powers claims thereafter. This was the order in which these claims were presented and addressed in the Court of Appeals. The state believes this order is most appropriate.

Caucus (SDC), to "make sure that SDC employees took vacation or compensatory time if they were seen by outside people working on campaigns" (1:34). The complaint further states: "The defendant was concerned about *getting caught* and did not appear to be concerned about the fact that it was wrong to have State employees working on campaigns while on State time" (*id*.) (emphasis added).

In light of Chvala's demonstrated knowledge that it was illegal for him to require state employees to operate political campaigns on state time with state resources, under *Tronca*, Chvala lacks standing to challenge the statute on grounds of vagueness.

II. CHVALA HAS FAILED TO DEMONSTRATE THAT THE OFFICIAL MISCONDUCT STATUTE, AS APPLIED TO HIS CONDUCT, IS VAGUE BEYOND A REASONABLE DOUBT.

Chvala asserts that § 946.12(3) is unconstitutionally vague as applied to him because a reasonable person could not be expected to know that the term "duties" as provided in that statute would encompass a public official's duty to refrain from hiring and directing employees to operate private political campaigns using state resources and funds.

The circuit court and the court of appeals rightly concluded that Chvala's vagueness challenge must be rejected. Chvala had ample notice that his activities were inconsistent with his official duties.

A. Legal standards governing vagueness claims.

A party seeking to invalidate a statute on grounds of vagueness must prove that it is unconstitutionally vague

beyond a reasonable doubt. *State v. Pittman*, 174 Wis.2d 255, 276, 496 N.W.2d 74 (1993). Courts "indulge every presumption to sustain the constitutionality of a statute." *State v. Wickstrom*, 118 Wis.2d 339, 351, 348 N.W.2d 183 (Ct. App. 1984).

Facing that heavy burden of proof, anyone challenging a statute on vagueness grounds must first show that "'because of some ambiguity or uncertainty in the gross outlines of the conduct prohibited by the statute, persons of ordinary intelligence do not have fair notice of the prohibition.'" *Pittman*, 174 Wis.2d at 276 (citation omitted). A statute provides fair notice if there is "sufficient warning to one wishing to obey the law that his conduct comes near the proscribed area." *Tronca*, 84 Wis.2d at 86. "'The fact that a statute fails to itemize with particularity every possible kind of conduct which would violate such statute does not make it unconstitutionally vague.'" *Ryan v. State,* 79 Wis.2d 83, 91, 255 N.W.2d 910 (1977) (citations omitted).

The second requirement to invalidate a statute is to prove that those who enforce the laws must create their own standards rather than apply standards set forth in the statutes. *Pittman*, 174 Wis.2d at 276-77. Courts must bear in mind that enforcement of any statute requires judgment, and this fact does not make a statute vague. *Kalt v. Milw. Bd. of Fire Com'rs*, 145 Wis.2d 504, 512, 427 N.W.2d 408 (Ct. App. 1988). A statute is not vague "'simply because "there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease."'" *Pittman*, 174 Wis.2d at 277. All that is required is a "'fair degree of definiteness.'" *State v. Courtney*, 74 Wis.2d 705, 710, 247 N.W.2d 714 (1976) (citation omitted). "'[O]ne who deliberately goes perilously close to an area of proscribed conduct'" assumes the risk "'that he may cross the line.'" *Courtney*, 74 Wis.2d at 711 (citation omitted).

A person whose conduct is clearly prohibited by the terms of a statute does not have standing to base a

vagueness challenge on hypothetical fact situations, since his case represents a permitted application. *Milwaukee v. K.F.*, 145 Wis.2d 24, 34, 426 N.W.2d 329 (1988); *Pittman*, 174 Wis.2d at 278. This is true even where a defendant's first amendment rights are implicated. *K.F.*, 145 Wis.2d at 34. Thus, the only question is whether, on *the facts of this case*, "'one bent on'" obeying § 946.12(3) would be unable to discern that the conduct described in the criminal complaint was near the "region of proscribed conduct." *Courtney*, 74 Wis.2d at 711.

B. Wisconsin Stat. § 946.12(3) is not unconstitutionally vague merely because it requires interpretation.

Section 946.12(3) requires proof that as a public officer Chvala exercised a discretionary power in a manner inconsistent with his duties with the intent to gain a dishonest advantage for himself or another. Wis. JI-Criminal 1732 (1990).

Section 946.12 reads as follows:

> **946.12 Misconduct in public office.** Any public officer or public employee who does any of the following is guilty of a Class I felony:
>
> **(1)** Intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of the officer's or employee's office or employment within the time or in the manner required by law; or
>
> **(2)** In the officer's or employee's capacity as such officer or employee, does an act which the officer or employee knows is in excess of the officer's or employee's lawful authority or which the officer or employee knows the officer or employee is forbidden by law to do in the officer's or employee's official capacity; or
>
> **(3)** Whether by act of commission or omission, in the officer's or employee's capacity as such officer or employee exercises a discretionary

> power in a manner inconsistent with the duties of the officer's or employee's office or employment or the rights of others and with intent to obtain a dishonest advantage for the officer or employee or another; or
>
> **(4)** In the officer's or employee's capacity as such officer or employee, makes an entry in an account or record book or return, certificate, report or statement which in a material respect the officer or employee intentionally falsifies; or
>
> **(5)** Under color of the officer's or employee's office or employment, intentionally solicits or accepts for the performance of any service or duty anything of value which the officer or employee knows is greater or less than is fixed by law.

As is evident, each of the subsections of § 946.12 contemplates a different manner in which misconduct in public office may be committed. Contrary to Chvala's assertions otherwise, the duty contemplated in § 946.12(3) does not have to be one established by a specific statute.[2] Even assuming such an element is required to be proven in other subsections of § 946.12 such as (1), (2) and (5) which all make reference to the "law," it does not apply to (3) because that subsection contains no such language. If such an element exists for those other subsections, interpreting (3) to require proof of the same would in effect make it identical to (2), thus making (3) redundant. Instead, it is clear that in creating (3), the legislature intended to reach conduct different from the other subsections, conduct that might not in itself be a specific violation of any statute, but that nonetheless constitutes misconduct in public office.

The fact that a violation of § 946.12(3) can be based upon an act not specifically identified in a statute

[2]While § 946.12(3) does not require proof that a public officer violated a duty imposed by statute, as discussed in section II.C.2 below, one of the sources of Chvala's duty in this case were the statutory prohibitions on using state resources for private campaigns.

does not make that subsection unconstitutionally vague. This court made that clear in *Tronca,* 84 Wis.2d 68. In that case, three defendants, one of them a Milwaukee alderman, were convicted as parties to the crime of misconduct in public office under § 946.12(3) for soliciting and accepting bribes in exchange for the alderman's support of a liquor license application. *Id.* Defendants in that case challenged their conviction on the grounds that the discretionary power exercised by the alderman, his approval of the liquor license, was an informal aldermanic privilege, not a formal discretionary power conferred by statute. *Tronca,* 84 Wis.2d at 76. This court rejected that argument, finding that the powers of a public official are not limited to expressly conferred powers but apply to *de facto* powers which arise by custom and usage and which are exercised under the color of office, and which, by virtue of the office, tend to have a corrupt influence on public affairs. *Tronca,* 84 Wis.2d at 80.

If a discretionary power under § 946.12(3) does not have to be specifically defined by statute, then neither does a duty for purposes of that statute.

Tronca is also notable for the court's discussion of whether the acts committed were "inconsistent" with the alderman's duties. In finding that they were, this court looked at several Milwaukee City Ordinances that defined the duties of common council members. *Tronca,* 84 Wis.2d at 82. One such ordinance prohibited a common council member from voting on any matter in which he may be directly or indirectly interested. *Id.* While the alderman in *Tronca* did not technically violate that ordinance because he did not have any ability to vote on the licensing application at issue, he did agree to informally support the application. The court found this violated the intent of the ordinance and therefore was inconsistent with his duties. *Id.*

Like § 946.12(3), other Wisconsin statutes leave room for interpretation without being rendered vague. For

example, Wisconsin's disorderly conduct statute prohibits persons from engaging, in a public or private place, in "violent, abusive, indecent, profane, boisterous, unreasonably loud *or otherwise disorderly conduct* under circumstances in which the conduct tends to cause or provoke a disturbance." Wis. Stat. § 947.01. The statute does not further define "otherwise disorderly conduct," nor does any other statute define that phrase. Nonetheless, the supreme court has held, for example, that this statutory language was not unconstitutionally vague as applied to a defendant's conduct in sending anonymous mailings with disturbing contents to three victims. *State v. Schwebke*, 2002 WI 55, 253 Wis.2d 1, 644 N.W.2d 666.

Wisconsin lacks a statute explicitly prohibiting "mailing of disturbing contents" to others, just as it lacks a statute expressly stating "the use of state resources for private campaigns is prohibited." The legislature is entitled to enact broadly worded statutes to address what it deems to be wrongful activity, whether the activity is a broad range of disorderly conduct that disturbs others or a broad range of official misconduct that diverts public resources for private advantage. In enacting § 946.12(3) to prohibit the corrupt exercise of discretionary power "'whether by act of commission or omission,'" the legislature clearly prescribed a broad scope of conduct which could be misconduct in public office. *Tronca*, 84 Wis.2d at 81.

The interpretation required for § 946.12(3) is simply no different from that required for many other statutes. *See, e.g., State v. McCoy*, 143 Wis.2d 274, 286-88, 421 N.W.2d 107 (1988) (though phrase "'imminent physical harm'" in Wis. Stat. § 946.715 is not defined, and the phrase did not appear in any other place in Wisconsin statutes, common usage and understanding of words provides reasonable notice); *State v. Armstead*, 220 Wis.2d 626, 640, 583 N.W.2d 444 (Ct. App. 1998) (terms "adequate treatment," "depreciate the seriousness of the offense," and "necessary to deter the child or other children," contained in Wis. Stat. § 970.032(2)(a)-(c) are

"fairly definite" and not unconstitutionally vague). Wisconsin's official misconduct statute is designed to operate in a flexible manner, in the same way that many other criminal statutes operate.

Chvala invites the court to search for ambiguity, which is not the purpose of statutory interpretation. *State v. Hamilton*, 2003 WI 50, ¶38, 261 Wis.2d 458, 661 N.W.2d 832. As shown above, many statutes require significant interpretation of a statutory word or phrase; this does not make the statutes vague. Decisions by this court and the court of appeals interpreting the official misconduct statute, as well as the pattern jury instructions for this statute, allow for such interpretation of the term "duties."

In *State v. Schwarze*, 120 Wis.2d 453, 355 N.W.2d 842 (Ct. App. 1984), the circuit court, in interpreting a public official's duties, instructed the jury that the defendant, an accounts receivable clerk for the Watertown School District, had a duty under § 946.12(3) to disclose shortages of money to her employer. The court of appeals held that the existence of a duty is a question of law. *Schwarze*, 120 Wis.2d at 455. Therefore, it was proper for the circuit court to instruct the jury that such a duty existed. *Schwarze*, 120 Wis.2d at 456. Chvala here fails to provide any basis to distinguish *Schwarze* from this case.

Additionally, the pattern jury instruction for § 946.12(3), Wis. JI-Criminal 1732, specifically instructs the court to fill in the blank with respect to the defendant's duty:

> The third element requires that the defendant exercised a discretionary power in a manner inconsistent with (the duties of his office) (the duties of his employment) (the rights of others). As a (position), it was defendant's duty to _____.

Furthermore, in the instant case, the state is able to point to several sources of Chvala's duty to refrain from

using state resources to conduct political campaigns, any one of which would be sufficient to sustain charges of public misconduct: (1) the long-established duty in Wisconsin law of conflict-free loyalty to the public, which is a state senator's employer; (2) chapters 11, 12 and 19 and other relevant provisions of the Wisconsin Statutes; and (3) the Senate's rules prohibiting such activity. Chvala violated this duty as discussed below.

C. Chvala had adequate notice that he had a duty, as contemplated by § 946.12(3), to refrain from using state employees and state resources to conduct campaign activity.

The duty that Chvala is charged with violating was the duty to refrain from using state employees and state resources to conduct campaign activity. The complaint alleges that as a state senator who was elected both Majority and Minority Leader, Chvala basically ran the State Democratic Caucus ("SDC") (1:7). The SDC was a state-funded entity that operated using state employees, state-leased offices and state owned or leased equipment (*id*.). Chvala is alleged to have used the state-funded SDC employees and resources for the private election campaigns of candidates he selected.

Specifically, with respect to Count Seven, Chvala is charged with misconduct for hiring Wendy Kloiber as a state employee to run the re-election campaign of State Senator Alice Clausing (1:20). According to Kloiber, that was the number one job for which she was hired. Chvala gave her a 10% raise based upon her performance on political campaigns, not on any other type of work (1:35).

Likewise, in Count Eight, Chvala is charged with misconduct for offering full-time state employment to Heather Colburn for the sole purpose of "putting money in the bank" for various campaigns (1:23).

Counts Nine and Ten allege that Chvala turned the SDC into a "campaign machine" in the months leading up to the 1998 and 2000 elections (1:33). From September through November 1998, SDC employees worked almost exclusively on campaigns and did very little policy work (1:25). From July through November 2000, other legislators knew not to request things from the SDC because the organization switched over to a "campaign machine" at that time. Chvala used SDC employees and resources for running specific targeted campaigns, fundraising, approving campaign literature, "doing doors and making fund-raising calls," recruiting volunteers for election day, creating campaign advertisements and budgets, and "develop[ing] campaign plans and fundraising strategy" (1:26-35).

In arguing that a reasonable person could not be expected to know that a public official has a duty to refrain from using state time and resources to operate private election campaigns, Chvala asserts that the vagueness of the official misconduct statute is somehow exposed by the fact that the state and courts continually point to additional sources for defining a public official's duties to include the duty to refrain from conducting campaigns using state resources. That the sources are ubiquitous only demonstrates the weakness of Chvala's vagueness challenge, not its strength. Further, as stated by the court of appeals, "Chvala cites no authority for the proposition that we are confined to a specific statute or to one specific source to ascertain his duty as a legislator." (Slip op. at 8, ¶ 13).

Chvala also contends that the sources of this duty identified by the court of appeals are inapplicable. This court is not confined to the sources of a public official's duties cited by the court of appeals or identified in the criminal complaint in determining whether the statute provides sufficient notice to survive a vagueness challenge. Therefore, in addition to addressing the sources of Chvala's duties identified by the court of appeals and addressed in Chvala's brief, the state

discusses other sources of the duty to refrain from hiring and directing employees to conduct partisan campaigns using state funds and resources.

1. Chvala had a clear fiduciary duty to the public to refrain from using taxpayer dollars to run private political campaigns.

One source of Chvala's duty to refrain from using state employees and resources for private campaigns stems from the fiduciary nature of Chvala's position as a public official. This fiduciary duty has long been recognized in Wisconsin: A public employee may not use public property for private gain. *Milwaukee v. Drew*, 220 Wis. 511, 518, 265 N.W. 683 (1936). A legislator violates her fiduciary duty as a public official by, for example, representing a private party before a government agency. *State v. Catlin*, 2 Wis.2d 240, 249-50, 85 N.W.2d 857 (1957) (acting in dual roles of legislator and attorney for client compromises requirement that legislator act only in what he conceives to be the public interest; even full disclosure would not overcome conflict). "A public office is created by law, not for the benefit of the officer but for the public." *State ex rel. Duesing v. Lechner*, 187 Wis. 405, 409, 204 N.W. 478 (1925).

This long-standing duty has been recognized as a duty for purposes of § 946.12(3). In *Schwarze*, the court of appeals held that a school district employee had a duty to report shortages of public money, under the theory of master (the public) and servant (the public employee). 120 Wis.2d at 456. The defendant in *Schwarze* did not steal these public funds herself. Instead, she became aware that they had been stolen, and failed to exercise the discretionary authority of her official position to disclose the shortages to her superior. In failing to make full disclosure of material facts bearing on her official responsibility, the public employee placed her personal

interest in protecting the thief above her official duties to the public, in violation of § 946.12(3).

Relative to *Schwarze*, this case presents an even more obvious duty in that it is axiomatic that public officials cannot covertly funnel taxpayer dollars into private ventures such as election campaigns.

Courts from other jurisdictions have also upheld misconduct charges based on an official's breach of his fiduciary duty to the public. For example, in *People v. Scharlau*, 565 N.E.2d 1319, 1323 (Ill. 1990), elected city commissioners were charged under an official misconduct statute which provided that a public officer commits misconduct when that official performs an act "in excess of his lawful authority" to "obtain a personal advantage for himself." The commissioners had negotiated a settlement in a voting rights action which established a transition period during which the commissioners would remain employed by the city for three years at a salary they themselves determined. *Scharlau*, 565 N.E.2d at 1321.

The Illinois Supreme Court held that, in securing for themselves the three-year terms of employment, the commissioners exceeded the scope of their authority and could be properly charged for official misconduct:

> Defendants had a duty to act in the best interests of the city. They also had a duty to refrain from using their positions as city commissioners for personal benefit. We agree that the defendants' settling the lawsuit was within their lawful authority. We find, however, that defendants' arranging for their own employment for a fixed term and salary was outside that authority. Public officials are expected to adhere to the highest standards of ethical conduct.

Scharlau, 565 N.E.2d at 1326. Here, Chvala is alleged to have used his official position for the personal benefit of individuals he determined were worthy of election.

As stated in *State v. Maiorana*, 573 A.2d 475, 480 (N.J. Super. 1990), a criminal case involving alleged misconduct in office under a New Jersey statute:

> When constructing statutes which prescribe the duties and obligations of public officials, it is a practical impossibility to spell out with specificity every duty of the office, and therefore courts take judicial notice of the duties which are inherent in the very nature of the office.

See also United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997) (public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest); *State v. Weleck*, 91 A.2d 751, 756 (N.J. 1952) ("Duties may be imposed by law on the holder of an office in several ways: (1) they may be prescribed by some special or private law ...; (2) they may be imposed by a general act of the Legislature ...; or (3) they may arise out of the very nature of the office itself[.]") (citations omitted); *State v. Deegan*, 315 A.2d 686, 695 (N.J. Super. 1974) (citation omitted) ("'These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office.'"); *State v. Parker*, 592 A.2d 228, 235 (N.J. 1991) (official misconduct statute does not require that the underlying act be criminal in nature).

Thus, Chvala was bound by a well-established fiduciary duty to the public to use public funds only on behalf of the public and not on behalf of private political campaigns.

2. The duty to refrain from using state resources for private campaigns has been codified by the Legislature.

Even though Chvala's duty to refrain from using state resources for private purposes was not required to be

set out by statute, that duty is clearly established in the statutes and the Senate's own Policy Manual and Guidelines.

a. Statutory provisions prohibit the conduct Chvala engaged in.

The Legislature has enacted numerous statutory provisions that prohibit the use of state resources for private campaigns.[3] While no one statute contains an express statement using the words "conducting political campaigns on state time using state resources is prohibited," the statutes taken together in effect produce that result. These statutes regarding campaign financing, prohibited election practices, and the duties of public officials demonstrate unequivocally that legislators act inconsistently with their official duties when they run private political campaigns using state resources or hire others to do so.

A campaign for office in Wisconsin is a private, regulated venture, not a function of legislative authority. A collective reading of chapters 11, 12 and 19 exhibits a legislative intent to keep political campaigns well-regulated and distinct from the work public officials are required to perform. These statutes are premised on a policy that in a democracy, citizens elect public officials to act for the common good; public officials may not treat the public's resources as their own in operating private campaigns.

Restrictions on the financing of election campaigns have long existed in Wisconsin. For example, in *State ex rel. Orvis v. Evans,* 229 Wis. 304, 282 N.W.14 (1938), this court examined campaign finance laws to determine whether a disbursement of mirrors and match containers for political purposes would render an election for municipal court judge null and void.

[3]For the court's convenience, the state has included the text of these statutes in its appendix (R-Ap.).

The current campaign financing restrictions are contained in chapter 11, enacted in 1973. Ch. 334, Laws of 1973. As expressly stated therein, one of the purposes of chapter 11 is to "enable candidates to have an equal opportunity to present their programs to the voters" and to ensure that the true source and extent of support for a candidate is fully disclosed. Wis. Stat. § 11.001(1) (R-Ap. 101). The legislature has also made a policy determination that in order "to ensure fair and impartial elections," officeholders are "preclud[ed] … from utilizing the perquisites of office at public expense in order to gain an advantage over nonincumbent candidates who have no perquisites available to them." Wis. Stat. § 11.001(2) (R-Ap. 101). In this case, Chvala was circumventing the entire purpose of chapter 11 by using the perquisites of his office to covertly provide state resources to certain state senate candidates he selected, services that were unavailable to the opponents of those candidates.

Chvala argues this provision does not apply because some of the candidates listed in the complaint were not incumbents (Chvala's brief at 36). Chvala ignores the allegations in Counts Seven and Ten that he used the perquisites of his office in order to direct SDC employees to run the campaign of incumbent Alice Clausing in 2000 (1:20-21, 31-41). Chvala concedes that a senator cannot use state resources to do a campaign mailing against his opponent (Chvala's brief at 36). Notwithstanding that concession, Chvala implies that financing private campaigns with public resources is perfectly acceptable: "The fundamental flaw in this prosecution rests on the premise, reiterated by the lower courts, that it is wrong to use public funds to finance private campaigns" (*id*. at 28). This proposition cannot in any way be reconciled with the existence of chapter 11 and its clear policy statement, or with any of the other various sources discussed here.

Chvala's conduct conflicts directly with several specific prohibitions found in chapter 11. Wisconsin Stat. § 11.36(1) precludes any person from soliciting services for political purposes from any state employee who is engaged in his or her official duties (R-Ap. 102). Chvala solicited SDC employees to perform services for political purposes while engaged in their official duties when he directed them to engage in campaign activity using state computers, supplies and office space during hours when the SDC offices were open to the public.

Chvala's conduct also fits within the literal terms of § 12.07(4), which provides that no person may attempt to influence an election by causing any person to provide any service or other thing of value to or for the benefit of a candidate, by means of denial or threat of denial of employment, work, or promotion, or compensation or other benefit of employment (R-Ap. 103-04). The complaint alleges that Chvala made some employment at the SDC contingent upon performance of campaign activity. For example, Wendy Kloiber was hired for that very purpose and her raise was based upon her campaign activities (1:35). Heather Colburn was offered employment for the sole purpose of fundraising (1:22-23). SDC employees Andy Gussert and Julie Laundrie understood that they would be fired if they were not successful in campaigning for particular candidates (1:29, 33).

Chvala argues, however, that he is a registrant under Wis. Stat. § 11.05 (A-Ap. 154) and therefore the charged conduct falls within the exception to § 12.07(4) which states: "This subsection does not apply to employment by a ... registrant under s. 11.05 in connection with a campaign or political party activities." Wis. Stat. § 12.07(4) (R-Ap. 103-04).

Chvala's interpretation nullifies the statute. Violation assumes that the employment which is conditioned on the employee's involvement in campaign activities is not a position intended for campaign

activities. Chvala seeks to use the very conduct which constitutes a violation of the statute—conditioning an employment position not intended for campaign activity on the employee's willingness to conduct campaign activity—as the exception to the violation.

To allow public officials to hire employees into publicly financed positions unintended for conducting campaigns and to then require those employees to operate political campaigns, as was alleged here, would be utterly inconsistent with the duties expressed in § 12.07(4) (R-Ap. 103-04).

Section 11.36(3) expressly requires that those in control of a state occupied office prohibit others from entering that office for purposes of making or receiving campaign contributions (R-Ap. 102). Here, Chvala had SDC employees using state offices to conduct campaign fundraising (*i.e.*, solicit contributions) and other private campaign activities (1:13).

Chvala claims § 11.36(3) is inapplicable to his conduct because he did not pay SDC staffers for their campaign work (A-Ap. at 153; R-Ap. 102). On the contrary, in hiring SDC staff to perform campaign activities and awarding raises or continuing employment based on success in that area, Chvala was compensating those employees specifically for their services to election campaigns.

Chvala also asserts that § 11.36(3) does not apply because the individual candidates did not authorize the use of SDC employees and therefore there was no "'in kind'contribution" (A-Ap. 152-53; R-Ap. 102). The candidates were obviously aware that these employees were working on their campaigns (1:30, 41, 45). The definition of "in-kind contribution" in Wis. Admin. Code § ElBd 1.20(1)(e) (2001) does not require that candidates knew the SDC employees were performing their campaign work on state time (R-Ap. 112). To say that these were not "in-kind contributions" because they were not

specifically authorized by the candidate would defeat the purpose of the statute. Further, Chvala's contribution of SDC staff and resources was made not only to individual candidates but also to the Senate Democratic Campaign Committee, a private campaign committee. He used a state employee, Joanna Richard, in her position as director of the SDC, as the director of the Senate Democratic Campaign Committee (1:24). Thus her services were in-kind contributions by Chvala to that private campaign organization.

These provisions codify Wisconsin's long-standing prohibition against private use of taxpayer funds, particularly in the context of campaign operations. They make clear that use of official power in this manner betrays the public trust under Wisconsin law because it is a misuse of public authority for private benefit, which undermines the authority of government and distorts our democratic system.

Chvala asserts that a "general statute" (*i.e.*, one that can be violated by any person) cannot establish a duty for a misconduct in public office charge (A-Ap. 150). In support of this argument, he relies on the court of appeals' decision in *State v. Schmit,* 115 Wis.2d 657, 340 N.W.2d 752 (Ct. App. 1983). *Schmit* involved a prison guard who was charged with misconduct in public office under § 946.12(2) for engaging in sexual intercourse with an inmate. Chvala's argument under *Schmit* fails for several reasons.

First, *Schmit* is distinguishable in that it involved a challenge to the sufficiency of the complaint, not a constitutional challenge.

Second, in *Schmit* the court focused on whether the complaint sufficiently alleged the defendant committed an act which was "forbidden by law to do in [her] official capacity," as required by subsection (2) of the misconduct statute, a subsection not at issue in this case. The court in that case noted that subsection (2) "evinces a legislative

intention to confine the application of the statute to acts committed within the scope of public employment." *Schmit*, 115 Wis.2d at 660. The court found that subsection (2) requires a nexus between the forbidden act and the defendant's public office. Thus, the thrust of the case was a determination of whether the defendant acted in her official capacity or engaged in a "'personal frolic.'" *Schmit,* 115 Wis.2d at 665.

The court determined that Schmit did not use her official position to commit the acts of fornication which formed the basis of the misconduct charge, and therefore could not be charged with misconduct under § 946.12(2). The court specifically noted that Schmit did not "utilize the power of her office in any manner when she had intercourse with the prisoner" and did not commit those acts in anything other than a "'purely private capacity.'" *Schmit,* 115 Wis.2d at 662. The court found significant the fact that Schmit did not "threaten[] sanctions or offer[] benefits within her power as a public officer to bestow or withhold" in order to gain the prisoner's consent to the acts alleged. *Id.* Had Schmit done so, the fornication statute could be the basis for a violation of 946.12(2). *Schmit,* 115 Wis.2d at 665. Thus, *Schmit* does not bar a prosecution under the misconduct statute based upon violation of a "general statute." Rather, in such a case there must also be a relationship between the acts committed and the individual's position as a public official.

In this case, there was a direct nexus between Chvala's alleged conduct and his official position. Chvala used his official position to solicit state employees to do campaign work on state time by offering benefits (*e.g.*, employment and/or raises in the case of Kloiber and Colburn), by threatening sanctions (termination of employment in the case of Laundrie and Gussert) (1:20-23, 29, 35), and by generally directing employees over whom he had control to perform these activities. Chvala did not do so acting in his private capacity because he would have had no ability to direct staff to perform such

work. Since Chvala misused the power of his public office to commit the acts alleged in the criminal complaint, even under *Schmit,* the misconduct charges in this case are permissible.

Numerous other provisions demonstrate the legislature's determination that state resources cannot be used for campaign activity. Even assuming that these provisions do not technically apply, as Chvala argues (A-Ap. at 150-58), they nevertheless provide further notice to Chvala that using SDC staff and resources for private campaigns was inconsistent with his duties. For example, Wis. Stat. § 11.37 restricts use of state vehicles for campaign purposes (R-Ap. 102). It would be an absurdity to have such a prohibition on the use of state vehicles if all other state resources were fair game for use by a public official in pursuing private campaign operations.

Wisconsin Stat. § 19.45(1) reaffirms the clear common law of all public officials' duties to act on behalf of the public rather than for personal gain:

> **(1)** The legislature hereby reaffirms that a state public official holds his or her position as a public trust, and any effort to realize substantial personal gain through official conduct is a violation of that trust. This subchapter does not prevent any state public official from accepting other employment or following any pursuit which in no way interferes with the full and faithful discharge of his or her duties to this state.

(R-Ap. 107-08).

Chvala violated the public trust by using his position as a state senator for personal gain rather than for the public good. Chvala had no responsibility to the public to assure the election of candidates he himself determined were worthy of election. In fact, in using state resources and funds on these chosen elections, his personal interest in these candidates' elections conflicted with his responsibilities to the public.

Chvala asserts that he and "every other citizen of this state have a responsibility to elect candidates in whom they believe to represent them in the senate." (A-Ap. 156). Even assuming that private citizens have such a responsibility and that it extends beyond the act of voting, facilitating the election of a particular candidate is *not* the job of public officials and chapter 11 makes clear that state resources are not to be used to subsidize election campaigns.

Furthermore, Wis. Stat. § 19.45(5) provides: "No state public official may use or attempt to use the public position held by the public official to influence or gain unlawful benefits, advantages or privileges personally or for others." (R-Ap. 108). Chvala did just that—he used his public position to influence or gain unlawful benefits, advantages or privileges for others, namely, certain candidates he determined should win elections.

Section 19.45(2) states: "No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself ..., or for an organization with which he or she is associated." (R-Ap. 108). Similarly, Wis. Stat. § 19.46(1)(b) states that "no state public official may … (b) [u]se his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for … an organization with which the official is associated." (R-Ap. 109).

"Associated," as defined in Wis. Stat. § 19.42(2), may refer to any organization for "which an individual ... is an authorized representative or agent." (R-Ap. 105-06). Chvala directed fundraising for the Senate Democratic Campaign Committee (1:7; 27). He also appointed the director of that organization (1:24). In hiring and directing publicly funded caucus employees to conduct the private campaign work of the Senate Democratic Campaign Committee, a private, partisan organization, Chvala used his public position and office to gain

substantial value and benefit to that organization with which he was associated.

Chvala's vagueness challenge rests on the assumption that in interpreting what their duties as public officials are under § 946.12(3), and deciding whether their actions might be inconsistent with such duties, those bent on obedience could not be expected to consider chapters of the Wisconsin Statutes such as "General Duties of Public Officials" (chapter 19) and the Code of Ethics contained in that chapter; "Campaign Financing" (chapter 11); or "Prohibited Election Practices" (chapter 12). This argument should fail. Reasonable public officials wishing to steer clear of violating § 946.12(3) would believe that at a minimum their duties are encompassed in the requirements of the "General Duties of Public Officials" and the Code of Ethics. Reasonable persons wondering whether conducting campaign activities on state taxpayer dollars would be "inconsistent with the duties of his office or employment" under § 946.12(3) would reasonably look to "Campaign Financing" (chapter 11) and "Prohibited Election Practices" (chapter 12) for guidance. Chvala's arguments, though couched in terms of vagueness, amount to nothing more than an assertion that "I didn't know it was against the law," or at least against this particular law, a claim that is unavailing in a court of law, and in any case is belied by the allegations in the complaint.

These statutory provisions, taken individually and collectively, provided adequate notice to Chvala that he had a duty to refrain from using state employees and resources for private election campaigns.

b. The Senate Policy Manual and Guidelines prohibit the conduct alleged in the complaint.

The Senate Policy Manual, referenced in the criminal complaint, reiterates the various statutory prohibitions described above:

> No political activity is permitted during working hours. No State facility, office, office equipment, supplies, etc. may be used for political purposes at any time. During non-office time employees may exercise their citizenship rights by political activity in community involvement.

(1:8; 14:430). In addition, the complaint describes a document entitled, "Wisconsin State Senate Guidelines for Incumbents" ("Guidelines"), which the Senate Clerk distributed in May of each election year (1:8; R-Ap. 113-31).[4] The introduction to the Guidelines states, "One simple rule to remember: State *offices and their supplies are not to be used for any campaign activity*." (R-Ap. at 114) (emphasis added). In Part I, the Guidelines examine the use of state equipment and supplies, noting that "[i]n November 1977, the Senate established a written policy that state equipment and supplies are strictly for conducting official state business and are not to be used at all for political campaign activities" (1:8; R-Ap. at 114).

In Part II, the Guidelines speak to state employee activity while on state time, stating specifically:

> * **Activity on Political Campaigns --** Senate policy and state law, s. 11.36, states, that "no

[4]Though referenced in the complaint (1:7-8), these Guidelines are not included separately in the record. However, this document is a state government publication of which this court may take judicial notice. *See* Wis. Stat. § 902.01(2)(a). *See also Perkins v. State,* 61 Wis.2d 341, 346, 212 N.W.2d 141 (1973) (this court has taken judicial notice of state records that are available at the seat of government in Madison that are easily accessible). The state includes the Guidelines in its appendix (R-Ap. 113-31).

> staff member may engage in activities for private business, or political purposes while on state time."
>
> In order to participate in campaign activities, the staff member must be on a "non-paid leave of absence" or use accumulated compensatory time or use vacation time. Accumulated sick leave cannot be used to work on campaign activities.

(R-Ap. at 116).

The Guidelines reference, and include in their Appendices, several Ethics Board and Election Board opinions which further repeat the prohibition on the use of state resources for campaign activities. For example, Ethics Board opinion 138 states:

> "The State Of Wisconsin Ethics Board advises you that you should not engage in campaign activities (a) with the use of the state's supplies, services or facilities not generally available to all citizens, (b) during hours for which you are compensated by the State of Wisconsin, or (c) at your office in the Capitol regardless whether the activity takes place during regular office hours. Moreover, you should attempt to refer campaign related inquiries received at your office to the legislator or legislator's campaign co+mmittee [sic]."

Guidelines (quoting Ethics Bd. 138) (R-Ap. at 124).

Likewise, an Elections Board opinion states:

> "Section 11.36, Stats., prohibits any officer or employee of this state from receiving from any other officer or employee of this state, while on state time or engaged in his official duties, any contribution or service which is primarily for a political purpose and not incidental to the officer's or employees' official duties."

Guidelines (quoting Op. El. Bd. 76-2 (1976)) (R-Ap. at 124).

Thus, the Senate Policy Manual and the Senate Guidelines, which summarize and incorporate various

other sources, are unequivocal: using state offices, state supplies, or state employees on state time for campaign activities is prohibited.

Chvala complains that a senate rule cannot be the basis for a charge under § 946.12(3). If a court may look to common law to establish a duty on the part of an employee to report money shortages to her employer as in *Schwarze*, a court may certainly look to explicit senate rules in determining a senator's duties. Likewise, in *Tronca,* this court found that the "discretionary power" contemplated in § 946.12(3) could include not only those powers conferred by statute or written policy, but also those *de facto* powers arising out of custom and usage. *Tronca,* 84 Wis.2d at 77-80. If a discretionary power can be identified based upon something other than an official statute, then so might a duty.

Chvala argues that the court of appeals' decision in *State v. Dekker*, 112 Wis.2d 304, 332 N.W.2d 816 (Ct. App. 1983), provided him with notice that senate rules cannot be relied upon to prove misconduct in public office (Chvala's brief at 35). Chvala did not raise this argument below and therefore it should be disregarded. *Neely v. State,* 97 Wis.2d 38, 55, 292 N.W.2d 859 (1980).

Moreover, *Dekker* did not provide Chvala with any such notice. *Dekker* did not involve a constitutional challenge to the misconduct statute. *Dekker* also did not involve § 946.12(3). Rather, the court of appeals in that case upheld dismissal of a criminal complaint charging police officers with failing to provide first aid in violation of Wis. Stat. § 946.12(1), a subsection not at issue here. Subsection (1) of § 946.12 makes it a crime to fail to perform a mandatory duty "within the time or in the manner required by law." The court found that a departmental rule to provide first aid was discretionary, rather than mandatory and therefore could not be the subject of a misconduct charge under Wis. Stat. § 946.12(1). In contrast, in this case § 946.12(3) is

charged, which does not require that the duty be mandatory or established "by law."

In light of the clear prohibitions discussed above, Chvala's claim that he had inadequate notice that senators have a duty to refrain from conducting campaign activities on state time using state resources is implausible.

D. Chvala failed to establish that those who enforce and apply § 946.12(3) are not able to do so without creating or applying their own standards.

For the same reasons set forth above, Chvala has also failed to establish the second prong of the test for vagueness, that those who enforce and apply § 946.12(3) would not be able to do so in this case without creating or applying their own subjective standards. *Pittman*, 174 Wis.2d at 276-77. In light of the clear authority prohibiting Chvala's conduct, there is no need to apply subjective standards here.

Chvala provides no reasonable alternative to the state's interpretation of § 946.12(3). Apparently, his view is that legislators and legislative staffers are simply not subject to § 946.12(3), since, under that statute, he does not consider himself bound by any fiduciary duty, the Campaign Finance Laws, the Code of Ethics for state officials or related provisions.

Chvala's interpretation would also nullify other statutes that apply to public officials, such as § 946.10(1), which prohibits bestowing any property or personal advantage on a state official to intentionally induce a state official "to do or omit to do any act in violation of the officer's … lawful duty ...." "Lawful duty" is not defined in § 946.10. Under Chvala's approach, courts lack a standard to determine when a legislator might have a lawful duty to do or refrain from doing anything.

For all of the reasons stated above, Chvala has failed to establish that § 946.12(3) is vague as applied to his conduct.

III. CHVALA'S ACTIVITIES ARE NOT PROTECTED BY THE SPEECH OR DEBATE CLAUSE.

Chvala asserts that art. IV, § 16 of the Wisconsin Constitution, commonly referred to as the Speech or Debate Clause, protects him from prosecution in this case. That clause reads as follows: "**Privilege in debate.** SECTION 16. No member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate."

In *State v. Beno*, 116 Wis.2d 122, 143-44, 341 N.W.2d 668 (1984), this court held that the Speech or Debate Clause extends beyond just words spoken on the floor of the Assembly or Senate in debate to matters that are "an integral part of the processes by which members of the legislature participate with respect to the consideration of proposed legislation or with respect to other matters which are within the regular course of the legislative process."

Beno involved the question of whether a legislative aide, who received information during a legislative investigation, was subject to subpoena in a civil trial. The aide sought to quash the subpoena, claiming, among other things, legislative immunity under art. IV, § 16. *Beno*, 116 Wis.2d at 128. The court held that, because the aide obtained the information at issue through a legislative investigation that was "within the regular course of the legislative process," the aide was entitled to immunity under art. IV, § 16. *Beno*, 116 Wis.2d at 145.

However, in *Beno* this court stressed that the protection of the Speech or Debate Clause is limited: while the privilege must be broad enough to protect the

integrity of the legislative process, it should not be so broad as to endow a legislator with absolute personal immunity or to protect him from any obligation to testify in a judicial proceeding. *Beno,* 116 Wis.2d at 142-43. The court recognized that judicial action may be needed to serve broad public interests in maintaining proper checks and balances or vindicating the public interest. *Beno*, 116 Wis.2d at 143. The court also noted that it was not dealing with a case in which a legislator had committed a criminal or unconstitutional act, suggesting that such acts would not be protected by the Speech or Debate Clause. *Beno*, 116 Wis.2d at 143 n.6.

The *Beno* court also emphasized that Wisconsin courts "are not bound by the construction given the speech and debate clause (article, I, section 6) of the United States Constitution by the United States Supreme Court." 116 Wis.2d at 134. The court noted that the framers of the Wisconsin Constitution sought guidance not merely in the federal Constitution "but also in the common law, the experiences, the tradition, and the values of the people of the territory of Wisconsin." *Beno,* 116 Wis.2d at 135. Because of the differences between the federal and state constitutions, a construction of the federal Speech or Debate Clause provides no "'clear implication as to the meaning of the state clause.'" *Beno,* 116 Wis.2d at 136 (citation omitted).

Chvala ignores the unique history and language of Wisconsin's Speech or Debate Clause and the Wisconsin Supreme Court's admonishment that our courts are not bound by federal precedent. Instead, he relies heavily on federal authority for his assertion that his prosecution is barred. Even under federal authority, however, his claim is meritless, particularly when that authority is viewed through the lens of *Beno*.

A. Chvala's activities are not protected because they were not integral to the legislative process.

Even though the Wisconsin and United States Supreme Courts have both determined that their respective Speech or Debate Clauses reach beyond mere debate on the floor to other matters within the course of the legislative process, both courts have gone to great lengths to emphasize that not all conduct by a legislator is protected by the respective Speech and Debate Clause at issue.

In *Beno*, this court stated:

> Not all of the legislator's activities fall within the protection of section 16. The privilege granted a legislator by section 16 is not unlimited. The constitution literally protects the member from liability for "words spoken in debate." The clause thus focuses upon matters occurring in legislative deliberations. Neither section 16 nor the separation of powers doctrine bars the court from ever exercising jurisdiction over a legislator. The principle accorded legislators by section 16 exists only to the extent necessary for the adequate functioning of the state legislative body.

116 Wis.2d at 142.

Similarly, in *Gravel v. United States,* 408 U.S. 606, 625 (1972), the United States Supreme Court noted that not all acts performed by senators in their official capacity were necessarily legislative in nature, and that legislative acts are not all encompassing. *Gravel,* 408 U.S. at 625. The Court further explained that "the courts have extended the privilege to matters beyond pure speech and debate in either House, but only when necessary to prevent indirect impairment of such deliberations." *Id. See also Doe v. McMillan,* 412 U.S. 306, 314 (1973) ("The [Speech or Debate] Clause has not been extended beyond the legislative sphere, and legislative acts are not all-encompassing.").

Chvala's activities, as alleged in the criminal complaint, are not within the legislative sphere and are not integral to the legislative process. In fact, they are the subject of criminal charges specifically because they were inconsistent with his legislative duties. The function of Wisconsin's legislative branch is "determining policies and programs and review of program performance for programs previously authorized." Wis. Stat. § 15.001(1). While broad, this description does not include direct operation of political campaigns within the sphere of legislative functions. A political campaign is not a state policy or program. As such, Chvala's conduct in hiring and directing state employees to conduct campaign work on state time and with state resources is not protected by the Speech or Debate Clause.

Chvala fails to articulate how his activities in hiring and directing state employees to operate partisan campaigns on state time using state resources relate to either the consideration of proposed legislation or other matters which are within the due course of the legislative process. He summarily states, without support or explanation, that the allegations against him are intertwined with his duties as a legislator and senate majority leader (Chvala's brief at 25).

By Chvala's logic, if a senator assigns a legislative employee to murder a member of the legislature or embezzle state funds, this would also be within the "regular course of the legislative process" because it would involve that senator's assignment of job duties to his or her employee. The mere fact that Chvala supervised state employees whose positions were supposed to be legislative in nature, does not transform his activities in ordering them to perform campaign election work into conduct that is related or integral to the legislative process. His direction of state employees in operating private campaigns is not an act performed as part of or even incidental to the role of a legislator.

Throughout his brief Chvala asserts there is great overlap between that which is legislative and that which is political. Even if true in some circumstances, that is not the case presented here. As already discussed, the activities conducted by the SDC employees which form the basis for the charges were not legislative in nature but were instead exclusively campaign related.

Chvala mischaracterizes the nature of the charges against him as being "based on his personnel decisions." (Chvala's brief at 24). Chvala is not being prosecuted because the state disagrees with the personnel choices he made with respect to carrying out his legislative duties. Rather, he is charged specifically with using state resources, including employees, for activities unrelated to the due functioning of the legislature. Because those activities were not integral to the legislative process, under *Beno* Chvala is not entitled to the protection of art. IV, § 16 of the Wisconsin Constitution in this case. *See also United States v. Rostenkowski,* 59 F.3d 1291, 1303-04 (D.C. Cir. 1995) (prosecution for use of legislative staff for personal services not prohibited by the Speech or Debate Clause); *Walker v. Jones,* 733 F.2d 923, 931 (D.C. Cir. 1984) (termination of Congressional food services manager not protected by Speech or Debate Clause); *Bastien v. Office of Campbell,* 209 F.Supp.2d 1095 (D. Colo. 2002) (speech or debate protections will not apply to a legislative functionary carrying out a non-legislative task).

In arguing that he is entitled to immunity under the Speech or Debate Clause, Chvala relies heavily on several cases involving personnel decisions. His reliance on those cases is misplaced.

Chvala relies most heavily upon *Browning v. Clerk, United States House of Representatives,* a decision by the D.C. Circuit Court of Appeals. 789 F.2d 923 (D.C. Cir. 1986). *Browning* is not controlling. First, it is not binding precedent because this court is bound on the subject of federal law only by the pronouncements of the United

States Supreme Court. *State v. Webster,* 114 Wis.2d 418, 426 n.4, 338 N.W.2d 474 (1983) (citations omitted). Thus, even if this court interpreted Wisconsin's constitutional provisions identically to the United States Constitution, this lower federal court decision would not be binding precedent. Moreover, the *Browning* approach has never been adopted by the United States Supreme Court, and, in fact, is inconsistent with that court's reasoning in *Forrester v. White*, 484 U.S. 219 (1988). As noted in *Gross v. Winter*, 876 F.2d 165, 170-71 (D.C. Cir. 1989):

> There is unquestionably tension between precedent of this court, which has "identified the ultimate issue to be the *duties of the employee*" in the context of immunity for congressional personnel decisions, *Browning*, 789 F.2d at 928 (emphasis in original), and *Forrester*, which accords no weight to the duties of the employee, "even though they may be essential to the very functioning of the" state institution at issue, 108 S.Ct. at 544."...
>
> ....
>
> The Supreme Court's strict "functional" immunity analysis in *Forrester*, however, contrasts with the employee-centric approach this court took in *Browning*.

See also Bates v. Hess, 1994 WL 854963, at *14 (D. Pa. 1994) ("Five pages or so were devoted to *Browning*, a curious choice of case law inasmuch as after the Supreme Court's *Forrester* decision, *Browning* was virtually rejected by the court that issued it. *See Gross v. Winter*, … 876 F.2d 165 (D.C.Cir.1989)").

Furthermore, even if *Browning* is persuasive authority, it is distinguishable. In that case, the court determined that Congressional staff were immune from suit by an official Congressional reporter alleging race discrimination. The court held that the standard for determining Speech or Debate Clause immunity for personnel decisions was whether the employee's duties were directly related to the functioning of the legislative

process. *Browning*, 789 F.2d at 929. The court determined that if the employee's duties are an integral part of the legislative process, such that they are directly assisting legislators in the discharge of their functions, personnel decisions affecting them are correspondingly legislative and shielded from judicial scrutiny. *Id.*

The court found that the reporter's duties in transcribing floor and committee proceedings were directly related to the legislative process, noting that some of the questions a court would be required to pose in considering the plaintiff's claim would implicate the areas protected by the clause, such as the nature and underlying purpose of the hearings to which the reporter was assigned, and whether the reporter's performance frustrated those purposes. *Browning,* 789 F.2d at 930. The court found that this sort of intrusion into the legislative sphere is exactly what the clause was designed to prevent. *Id.*

The *Browning* case is distinguishable on its face because the duties performed by the reporter in that case, which would be the subject of inquiry if that suit was allowed to proceed, were legitimate duties related directly to the functioning of the legislative process. *Browning*, 789 F.2d at 929-30.

Noticeably absent from the *Browning* case and *Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23 (D. D.C. 2001), a case cited by Chvala, was any suggestion or allegation that the employees' duties were anything but legitimate duties directly related to the operation of the House.

The Wisconsin cases Chvala cites are distinguishable for the same reason. For example, in *Barland v. Eau Claire County,* 216 Wis.2d 560, 565, 575 N.W.2d 691 (1998), this court held that a removal of a judicial assistant by way of a collective bargaining agreement violated the doctrine of separation of powers because that action impermissibly interferes with the

court's ability to carry out its constitutional duties. *Barland*, 216 Wis.2d at 581-82. Neither *Barland* nor any of the other Wisconsin cases cited by Chvala involved allegations that judicial employees or resources were being misused.[5] Rather the courts found separation of powers violations specifically because of interference with employees or facilities essential to the proper functioning of the courts. *See, e.g., In re the Appointment and Removal of the Janitor of the Supreme Court,* 35 Wis. 410 (1874).

In contrast, in this case, it was Chvala's use of employees for activities unrelated to the due functioning of the legislature that led to criminal charges. To characterize Chvala's supervision of SDC employees in conducting campaign work as "legislative" would be to "stretch the meaning of the word beyond sensible proportion." *Walker,* 733 F.2d at 931.

B. Chvala's acts, even if legislative in nature, are not protected by the clause because it would not serve the purpose of the clause.

Even assuming that this case will require inquiry into legislative acts, Chvala is still not entitled to the protection of the Speech or Debate Clause.

Both the Wisconsin Supreme Court and the United States Supreme Court have been careful to make clear that their rulings were limited to the cases before them. In so doing, they left open the possibility of prosecution in a case such as this one which involves criminal charges for misconduct.

As already noted above, the court in *Beno* cautioned that judicial action might be needed to serve broad public interests such as maintaining the proper

[5]These cases also did not involve challenges under the Speech or Debate Clause.

checks and balances or vindicating the public interest. *Beno,* 116 Wis.2d at 143.

As is evident by the fact Chvala's alleged misconduct spanned at least four years, any internal legislative checks on Chvala's misuse of his position were unsuccessful. Absent intervention by the executive and judicial branches in this case, Chvala's alleged criminal conduct in the misuse of state employees and state resources would be continuing today unabated.

The courts have never interpreted legislative immunity provisions to be so expansive as to preclude all checks on the legislative branch. Indeed, one of the purposes of the provision is to ensure the integrity of the legislative process. *Beno*, 116 Wis.2d at 141, 142-43. Interpreting the Speech or Debate Clause to provide Chvala with protection for misuse of his position would thwart that purpose and would preclude vindication of the public's interest in holding corrupt legislators responsible for their actions.

As the United States Supreme Court has recognized the Speech or Debate Clause was not intended to make members of Congress "super-citizens, immune from criminal responsibility." *United States v. Brewster,* 408 U.S. 501, 516 (1972).

C. Chvala's acts are not protected by the Speech or Debate Clause because he is charged under a specific statute applicable to members of the legislature.

In *Beno*, the court emphasized that it was not addressing a situation in which the legislator has committed a criminal or unconstitutional act in the course of legislative duties, or a case in which the disclosure of words or acts within the scope of legitimate legislative functions is sought in a criminal case. 116 Wis.2d at

143 n.6. This court reiterated this principle in *In re John Doe Proceeding*, 2004 WI 65, ¶ 21, 272 Wis.2d 208, 680 N.W.2d 792. This language suggests that a prosecution such as this one may proceed.

Decisions by the United States Supreme Court are in accord. In *United States v. Johnson,* 383 U.S. 169 (1966), the Court held that prosecution under a general criminal statute, such as conspiring to defraud the United States, is prohibited if dependent on inquiries into legislative acts or the motivations for such acts. *Johnson*, 383 U.S. at 185. However, the Court specifically left open the question of the application of the clause in a prosecution which, though possibly involving inquiry into legislative acts, is founded upon a narrowly drawn statute passed by Congress in exercise of its legislative power to regulate the conduct of its members. *Id.* It is significant that the *Johnson* Court did not question the power of the government to try the defendant on charges of violating a conflict-of-interest statute that specifically applied to members of Congress. *Brewster,* 408 U.S. at 510. The Court again raised this question of prosecution for legislative acts under a narrowly drawn statute, but declined to answer it in *Brewster,* 408 U.S. at 529 n.18.

In this case, Chvala is charged under § 946.12(3), which by its nature is concerned with the activities and duties of a public officer. In making this statute applicable to all public officers, the legislature was exercising its legislative power to regulate the conduct of its members, *Johnson,* 383 U.S. at 185, giving limited authority to the executive and judicial branches to inquire into legislative activity and the underlying motivation for purposes of rooting out corruption.

IV. CHVALA FAILS TO SHOW BEYOND A REASONABLE DOUBT THAT THE CHARGES IN THIS CASE VIOLATE THE SEPARATION OF POWERS DOCTRINE.

Chvala asserts that prosecution in this case violates the separation of powers doctrine because it requires an impermissible inquiry into an ambiguous senate rule and presents a nonjusticiable issue. Chvala must establish a constitutional violation beyond a reasonable doubt. *State v. Holmes*, 106 Wis.2d 31, 38, 315 N.W.2d 703 (1982). He fails to meet his burden and his separation of powers claim must fail.

A. The courts may adjudicate the criminal charges against Chvala in this case, even if senate rules must be applied to define his duties as senator.

Chvala asserts generally that "it is the duty of the senate to interpret its own rules," a duty within the legislature's "core zone of authority" (Chvala's brief at 8, 10).

Fundamentally, Chvala's argument is merely an assertion that as a member of the Senate, he is beyond the reach of the criminal law. No one is beyond the reach of the criminal law, not even Chvala.

Chvala relies on art. IV, § 8 of the Wisconsin Constitution, which provides that "Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior, and with the concurrence of two-thirds of all the members elected, expel a member[.]"

Prosecuting Chvala for criminal offenses under § 946.12(3) does not violate art. IV, § 8. Neither the executive nor the judicial branch is interfering with the

Senate's ability to "determine the rules of its own proceedings" or is impeding the due functioning of the legislature. Nor does the state attempt to prosecute for contempt or disorderly behavior or seek to expel anyone from the legislature. The state is merely looking at an existing legislative rule as one source for determining what duties Chvala had and whether he acted inconsistently with those duties, for purposes of enforcing a criminal statute. That statute was obviously designed to hold public officials accountable for the misuse of their position. The executive branch has the obligation to enforce such statutes. Wis. Const. art. V, § 4.

This court rejected a similar separation of powers argument in *In re John Doe Proceeding,* 272 Wis.2d 208. In that case petitioners challenged a John Doe subpoena issued to the Legislative Technology Services Bureau on the grounds that the subpoena intruded into the legislature's "core zone" of authority and that § 13.96 was a "rule of proceeding" under art. IV, § 8, that only the legislature could interpret. *In re John Doe Proceeding*, 272 Wis.2d at ¶ 24. In rejecting these arguments, this court noted that the subpoena was not attempting to change the way in which the legislature functions but rather was attempting to gather information in a criminal investigation. *In re John Doe Proceeding*, 272 Wis.2d at ¶ 26. The court further noted that if all of the documents maintained by the LTSB were out of bounds to a criminal investigation, "the legislature would have effectively immunized its members and employees from criminal prosecution and in so doing usurped the role of the executive branch in assuring the faithful execution of the laws and the prosecution of crime." *Id.*

While recognizing that courts generally are unwilling to decide whether the legislature adhered to its own rules governing how it operates, this court found that § 13.96, which makes the electronic records of the legislature confidential, was not a rule of proceeding for purposes of art. IV, § 8, because it had "nothing to do with the process the legislature uses to propose or pass

legislation or how it determines the qualifications of its members." *In re John Doe Proceeding*, 272 Wis.2d at ¶ 30. So too is the rule at issue here not a "rule of proceeding." A rule that reiterates statutory prohibitions on the use of state resources for private campaigns has nothing to do with the process the legislature uses to propose or pass legislation or how it determines the qualifications of its members. Instead it prohibits the use of state resources for activities that are *not* related to those functions.

In *In re John Doe Proceeding,* this court found compelling the fact that the subpoena sought information in the course of a criminal investigation, a function assigned to the executive branch. 272 Wis.2d at ¶¶ 26, 31. In the present case, the executive branch is carrying out its function of prosecuting criminal activity.

The cases Chvala cites do not support his position that only the legislature can examine its rules. Chvala implies that in *Integration of Bar Case,* 244 Wis. 8, 11 N.W. 604 (1943), this court found it had no power to review internal legislative rules (Chvala's brief at 8-9). On the contrary, the court interpreted and relied upon two specific legislative rules in reaching its conclusion that the bill at issue had been properly enacted. *Integration of Bar Case,* 244 Wis. at 28, 29-35. Likewise, in *State ex rel. Elfers v. Olson,* 26 Wis.2d 422, 426-29, 132 N.W.2d 526 (1965), this court relied upon a legislative rule in determining whether a legislative action fell within art. IV, § 8.

Rostenkowski, 59 F.3d 1291, also relied upon by Chvala, actually cuts against Chvala's position.

In *Rostenkowski,* Illinois Congressman Daniel Rostenkowski was charged with misappropriation of public funds. Rostenkowski argued that the prosecution violated the Rulemaking Clause and the separation of powers doctrine because it was based on interpretation of

the legislative rules. 59 F.3d at 1306. The Rulemaking Clause, like art. IV, § 8 of the Wisconsin Constitution, empowers Congress to "determine the rules of its proceedings, punish for contempt and disorderly behavior, and with the concurrence of two-thirds of all the members elected, expel a member." U.S. Const. art. I, § 8.

The court there held "it is perfectly clear that the Rulemaking Clause is not an absolute bar to judicial interpretation of the House Rules." *Rostenkowski,* 59 F.3d at 1305 (citing *Yellin v. United States,* 374 U.S. 109, 114 (1963)).

Thus, under *Rostenkowski*, judges are not prohibited by the Rulemaking Clause or by the doctrine of the separation of powers from interpreting legislative rules; indeed, the prosecution may rely on legislative rules in its efforts to prove statutory violations. 59 F.3d at 1305.

Like Rostenkowski, Chvala rests his arguments on "the mistaken premise that the [state] seeks to impose criminal liability upon him for violating [legislative] Rules themselves." *Id*. The state is prosecuting Chvala for a violation of the criminal law, namely, § 946.12(3), a felony. The senate rule is one source for determining Chvala's duties for purposes of enforcing § 946.12(3).

The *Rostenkowski* court pointed out that there are numerous criminal statutes that, if violated by a legislator, would require reliance on legislative rules for prosecution. For example, in a prosecution of a legislator for fraud or embezzlement of public funds, the government would have to show that the defendant diverted funds for an unauthorized purpose. *Rostenkowski*, 59 F.3d at 1305. *See also* Wis. Stat. § 943.20(1)(b) (theft by bailee).

Similarly, a prosecution for official misconduct under § 946.12(3) requires inquiry into a public official's discretionary powers, duties, and intent. It applies to all public officers without exception, including members of

the legislature itself. *See* Wis. Stat. § 939.22(30) (public officer is any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units).

The *Rostenkowski* court properly recognized that accepting an argument like Chvala's "would effectively insulate every Member of Congress from liability under certain criminal laws." *Id.* The court concluded that "[n]either the Rulemaking Clause nor the doctrine of the separation of powers requires that result." *Id.* This court reached a similar conclusion in *In re John Doe Proceeding*, 272 Wis.2d at ¶ 26.

A finding that a prosecution under § 946.12(3) in this case violates separation of powers would render that section unenforceable. It would similarly invalidate all of the provisions regulating legislators' activities contained in chapters 11, 12 and 19, discussed above.

B. The official misconduct charges in this case are justiciable because they do not interfere with any unique function of the legislature and because they rest on unambiguous legal standards.

Chvala claims the Senate Policy Manual is ambiguous (Chvala's brief at 10-19). This argument is intertwined with Chvala's assertions in Section III of his brief that this case presents a nonjusticiable "political question" (Chvala's brief at 27-30). Therefore, the state addresses them together, rather than in the order presented by Chvala.

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the United States Supreme Court identified six alternative factors to be considered in determining whether an issue is a "political question" and therefore nonjusticiable. At least one of the factors must be "[p]rominent on the

surface" if an issue is to be determined nonjusticiable. *Id.* Further, such a determination must be made or based upon the particular facts and posture of an individual case. *Id. See also Rostenkowski,* 59 F.3d at 1310. Therefore, any hypothetical situations raised by Chvala should be disregarded as they are not relevant to the question of justiciability in this case.

Chvala addresses only the first two factors set forth in *Baker v. Carr*: a textually demonstrable constitutional commitment to a coordinate political department and a lack of judicially discoverable and manage standards for resolving the issue. In ignoring the other factors, Chvala rightfully concedes that they are not relevant here. The first and second present no obstacle either.

In arguing for the applicability of the first factor, constitutional commitment of the issue to another branch, Chvala merely reasserts his arguments related to art. IV, § 8, discussed above. As stated, this constitutional provision addresses legislative procedural rules, punishment for "contempt" and "disorderly" behavior, and expelling members. It is inapplicable to the criminal charges at issue here.

With respect to the second *Baker* factor, Chvala argues that there are no judicially manageable standards to prosecute him under § 946.12(3) because rules prohibiting engaging in political campaign activity are sufficiently ambiguous so as to be non-justiciable.

As support, Chvala points to the *Rostenkowski* court's finding that "a sufficiently ambiguous house Rule is non-justiciable." However, Chvala ignores the necessary corollary to that principle, which the *Rostenkowski* court clearly articulated:

> If a particular House Rule is sufficiently clear that we can be confident of our interpretation, however, then that risk is acceptably low and preferable to the alternative risk that an ordinary crime will escape the

> reach of the law merely because the malefactor holds legislative office.

Rostenkowski, 59 Wis.2d at 1306. Thus, a court may interpret an internal legislative rule if there is a reasonably "discernible legal standard." *Id.* (citing *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1385 (D.C. Cir. 1981)).

The standards for resolving the criminal charges in this case are discernible and unambiguous. As already discussed above, the use of state resources and employees for campaign activities is expressly prohibited by the statutes and the Senate's Policy Manual and Guidelines. Notwithstanding these explicit prohibitions, Chvala attempts to obfuscate this case by attacking particular phrases in the Senate Policy Manual as being ambiguous. The Senate Policy Manual cannot be viewed in isolation and Chvala's myopic approach should be rejected.

Chvala first argues the phrases "political activity" and "political purposes" contained in the Senate Policy Manual are ambiguous and thus only the legislature may define them.

The legislature has already done so. The phrase "political activity" is used interchangeably with "political purposes" and "campaign activity" in the policy manual and guidelines. "Political purposes" is a term of art that has been equated with campaign activity by the legislature and the courts since long before the senate adopted its written policy in 1977.

For example, the phrase "political purposes" was already in use in chapter 11 at the time the senate adopted its written policy. Significantly, that chapter is entitled "Campaign Financing." The campaign finance restrictions therein apply primarily to acts done "for political purposes," which are specifically defined as acts done "for the purpose of influencing the election or

nomination for election of any individual to state or local office." Wis. Stat. § 11.01(16).[6]

Chvala complains the phrase "for political purposes" cannot be interpreted using reference to § 11.01(16) because that definition "is so broad that it impacts virtually everything a legislator does." (Chvala's brief at 11). In attacking the definition of "political purposes" in § 11.01(16) as including everything a legislator does, Chvala is now arguing that all of chapter 11 is unenforceable when applied to sitting legislators. Such an interpretation is absurd.

It is inherent in a senator's job to advance a political viewpoint and agenda, and senate caucus staff may obviously assist the senator in doing so. It cannot be seriously argued that a Senate Policy Manual or the campaign finance laws could be reasonably construed to prohibit senators or senate caucus staff from advancing a political platform. The policy can only be reasonably construed to prohibit activities done for the exclusive purpose of furthering a campaign, the sole form of conduct alleged here.

Lest there be any doubt about the type of political activity the senate policy prohibits, the Guidelines make it clear: state equipment, supplies, and employees are strictly for conducting official state business and are not to be used at all for political *campaign* activities (1:8; R-Ap. at 114, 116, 124).

Chvala also points to the Senate Policy Manual's use of the term "working hours" as ambiguous. This argument should be disregarded as Chvala did not raise it in the lower courts.

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[6]Predecessor statutes to chapter 11 also defined the phrase "for political purposes" in a similar manner. *See, e.g., State ex rel. LaFollette v. Kohler,* 200 Wis. 518, 564, 228 N.W. 895 (1930) (interpreting then existing § 12.01).

Regardless, the state notes first that Chvala's argument regarding "working hours" is irrelevant to state employees conducting campaign activities in their offices since the senate rule specifically states that the use of state facilities, offices, office equipment and supplies may not be used for political purposes *at any time.* (1:8; 14:430) (emphasis added). Therefore, SDC employees' use of state offices, phones, computers, etc. for campaign purposes was a violation of the rule in itself, irrespective of whether they were using leave time.

With respect to the use of state employees outside of state offices, such activity is only permissible under the Senate Policy Manual during "non-office time." (1:8; 14:430). The Guidelines elaborate on this to say that in order to participate in campaign activities, employees must be on a "non-paid leave of absence" or use accumulated compensatory time or vacation time (R. App. at).

Chvala asserts that "it is unclear what portion of any day is state time rather than personal time" for senate employees because they do not have set hours (Chvala's brief at 16-17).

While it is true that there are no specific "work hours" set forth in the statutes for state employees, that fact alone does not make the phrase ambiguous or undiscernible. At a minimum, full-time state employees are required to work forty hours per week, divided into five workdays of eight hours each. Wis. Stat. § 230.35(5)(a) and (b) (R-Ap. 111). Additional hours may be required when the needs of the employing unit cannot be fulfilled by adhering to the standard workweek. Wis. Stat. § 230.35(5)(a) (R-Ap. 111). "State time" or "working hours" for purposes of a state employee would then obviously include the forty hours per week an employee is required to work in exchange for his or her state pay check.

If, as alleged in this case, a state employee was engaged full-time in campaign work as part of the forty hours they were obligated to work for the state, then a clear violation exists. For example, Wendy Kloiber was working full-time on the Hansen campaign during the weeks leading up to the November 2000 election (1:35). Other caucus workers were working 90% of their time on campaigns (1:28).

As evidence of the ambiguity of "working hours," Chvala points to an allegation in the complaint that Senator Meyer believed SDC employee Jay Wadd was assisting the Meyer campaign while on vacation time or at other times outside of Wadd's SDC employment (Chvala's brief at 17). Chvala fails to explain how Senator Meyer's misperception makes the term "working hours" ambiguous. If anything, Senator Meyer's expectation in that instance is evidence that others commonly recognized the difference between state time and private time and understood that state employees could not be working on campaigns on the state's dime.

Regardless, Chvala fails to show that the rules which prohibit using state resources are ambiguous as applied in this case. They clearly prohibit the conduct alleged in the complaint.

Further, applying these unambiguous rules to the charges against Chvala requires no impermissible inquiry into the "internal workings" of the legislature (Chvala's brief at 19). In proving misconduct for the hiring of Wendy Kloiber, as alleged in Count Seven, the state need only inquire into the campaign activities that Kloiber was involved in and Chvala's role in those activities. The state will not be required to delve into legislative acts by Chvala or Kloiber, assuming she performed any such acts.

For purposes of Count Eight, the state need only prove that Chvala offered employment to Heather Colburn for the sole purpose of "putting money in the bank" for various campaigns (1:23). Raising campaign funds is not

the function of state employees and is not part of the legislative process. Indeed, employment contingent upon the performance of campaign activity is specifically prohibited under Wis. Stat. § 12.07(4) (R-Ap. 103-04). Inquiry outside the fund-raising nature of the position Chvala offered to Colburn is not necessary in order to prove Chvala engaged in the misconduct alleged in this count.

In proving Counts Nine and Ten, the state will seek to prove that during the periods charged in the complaint, Chvala used the SDC and its staff not to assist legislators in the discharge of their legislative functions but to assist individuals in their capacities as private citizens running for office. Inquiry need not be made into any legislative activity the SDC might have engaged in during that period of time because it was the non-legislative, purely political work that employees of the SDC performed that are the subject of those charges.

This case is analogous to one of the charges deemed permissible in *Rostenkowski.* While finding certain activities were nonjusticiable because they might involve a mix of official and personal activities, the court found that a charge involving a congressional employee who did "'little or no official work'" and "'performed regular bookkeeping duties'" for Rostenkowski's private insurance business was justiciable. *Rostenkowski,* 59 F.3d at 1310. The court determined that no reasonable interpretation of "official work" could include the performance of bookkeeping work for a private company owned by a Congressman. *Id.*

This case is justiciable for the same reason. A state employee doing work for a private election campaign is no different than a federal employee doing work for a private insurance business. The conduct alleged in the complaint in this case cannot be reasonably characterized as anything other than "political campaign activity," and was clearly prohibited by senate rules.

In arguing that this case presents a nonjusticiable question, Chvala attempts to show that prosecution of this case will result in dire consequences, arguing that every elected official who runs for re-election is guilty of misconduct because "she is using state resources, (*i.e.*, her time) on a private campaign." (Chvala's brief at 28). Chvala's argument assumes that once an individual becomes a public officer or public employee, that individual no longer has the ability to act in his or her private capacity. Nothing could be further from the truth, as is evident by the court's finding that the prison guard in *Schmit* engaged in a "personal frolic" even while on duty in her public position. *Schmit*, 115 Wis.2d at 664. Further, just because Chvala can create hypotheticals that could arguably be considered ambiguous under the rules does not mean this case is nonjusticiable. As already noted, the question of justiciability must be determined based upon the particular facts of this case. *Carr,* 369 U.S. at 217; *Rostenkowski*, 59 F.3d at 1305.

As the court of appeals correctly found in this case, most of Chvala's alleged misconduct unquestionably constituted campaign activity. With respect to such conduct, the court aptly stated:

> The trial court will not need to speculate as to whether this conduct could include legitimate legislative activity. On the contrary, these allegations show political campaign activity of the most basic type: the preparation and dissemination of campaign literature, political fundraising efforts on behalf of a number of candidates for the Wisconsin Senate, campaign data management on state computers, daily monitoring of campaign progress by Chvala, development and implementation of campaign strategy and debriefing of the 2000 election cycle on state time in state offices. The result is public financing of private campaigns without the public's permission. There is no reasonable argument that his activity serves any legitimate legislative duty or purpose. No statute, rule or policy sanctions this behavior.

(Slip op. at 35-36, ¶ 77).

Chvala points to the court of appeals conclusion that two specific activities discussed in the complaint—performing "opposition research" and monitoring a targeted Senator's press clippings, his or her votes, and committees chaired by the Senator—were not free from doubt as to whether they were purely campaign activity and that they therefore did not allege justiciable violations. (Slip op. at 27-28, 30, ¶¶ 56-58, 64). The state respectfully disagrees with the court's conclusion about those particular activities and believes all of the conduct alleged in Counts Seven through Ten was purely campaign activity. However, even if this court were to agree that certain activities alleged in the complaint are nonjusticiable, such a finding would not make the entire case nonjusticiable, as is clear from *Rostenkowski*. The court there parsed out that which was justiciable from that which was not. *Rostenkowski,* 59 F.3d at 1310-12.

Chvala goes to great lengths to convince this court that this case should be controlled by *People v. Ohrenstein*, 549 N.Y.S.2d 962 (1989), a case from New York which is not binding upon Wisconsin courts. Even if this court were inclined to adopt the approach taken in that case, *Ohrenstein* is unavailing to Chvala. In *Ohrenstein*, the court determined that "there were no legislative standards, rules or guidelines in existence detailing the 'proper duties' of legislative employees." 549 N.Y.S.2d at 975. As set forth above, this is not the case here.

Cannon, 642 F.2d 1373, may be distinguished on similar grounds. The *Cannon* court held there was "a complete absence" of judicially discoverable and manageable standards for resolving the question whether Senators may use paid staff members in their campaign activities. *Cannon*, 642 F.2d at 1379. The court stated: "Not even the Senate itself has been able to reach a consensus on the propriety of using staff members in

reelection campaigns." *Cannon*, 642 F.2d at 1380. Furthermore, no other statute, administrative law or judicial decision guided the court in determination of the issue generated by the charges. *Cannon,* 642 F.2d at 1379.

In contrast, the Wisconsin Legislature has clearly established that state employees and state resources cannot be used to conduct campaign activities. Given this clear policy statement by the legislature, Chvala's claims that the Senate Policy Manual is ambiguous and that this case presents a nonjusticiable issue are without merit.

In view of the foregoing, Chvala has failed to demonstrate a textually demonstrable constitutional commitment of this issue to the legislature or a lack of judicially discoverable and manageable standards for resolving the issue. *Carr*, 369 U.S. at 217. Consequently, this case is justiciable and Chvala's separation of powers claim fails.

CONCLUSION

> Left unsaid thus far are certain propositions so deeply embedded in our jurisprudence that they rarely find expression. Perhaps those values which go to the very heart of our democratic system of government need restating. The first is that no man is beyond the reach of the law. And the second is that those privileged to make the laws are obliged to obey them and live within their prescriptions.

State v. Gregorio, 451 A.2d 980, 988 (N.J. Super. Law Div. 1982). Chvala was properly charged under well-established law, and his prosecution should go forward. Therefore, the state respectfully requests that this court

affirm the court of appeals' decision and the circuit court's order denying Chvala's motion to dismiss.

Dated this 13th day of September, 2004.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 14,822 words.

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